Chapter 16

Maritime Safety and Vessel-Source Pollution Control in the European Union Context

Malgorzata Anna Nesterowicz[*]

16.1. Introduction

The analysis of maritime safety and vessel-source pollution control issues is a part of a comparative, European Union-Canadian exercise, whose aim is to increase academic and public understanding of European Union (EU) and Canadian approaches and challenges in governing key human uses of the oceans. The particular aim of this contribution is to compare solutions to similar problems relating to maritime safety and vessel source pollution control in two different settings, highlighting areas of convergence and divergence of interests and practices.

This chapter presents the legislative solutions concerning maritime safety in the EU. In particular, it touches upon accelerated phasing out of single-hulls, establishment of places of refuge, supervision over classification societies, port state control, vessel traffic monitoring, liability issues, as well as protection of sensitive environments and criminalisation of ship-source pollution.

16.2. The Significance of Maritime Trade for the European Union

The 27 EU Member States have over 600 significant ports along their thousands kilometres of coastline. Nearly 90 percent of the trade volume between the EU and the rest of the world is transported by sea. In relation to the trade between the EU Member States (short sea shipping), this number reaches 69 percent and is still growing. Amongst all this, there is an ever-growing number of tankers carrying increasing volumes of oil and hazardous substances through sensitive areas such as the Mediterranean and Baltic seas.[1]

---

[*] The opinions expressed in this paper are private opinions of the author and do not necessarily represent those of the European Maritime Safety Agency.

[1] See European Maritime Safety Agency (EMSA) website at <http://www.emsa.europa.eu> (retrieved 12 December 2008).

It is obvious that such traffic, due to its density and potential consequences to the environment needs to be regulated. On the basis of the subsidiarity principle, one of basic principles of European law, if certain objectives can be achieved better by the Community as a whole than by individual Member States, then the Community can legislate in the area belonging to shared competencies (like maritime transport) and in this way "takes over" the subject. This means that Member States will no longer legislate within it independently and the rules that the EU establishes are supreme. Maritime safety, due to the transboundary character of pollution and maritime transport as such, is deemed to be an area where the Community can achieve the objectives of the protection of the environment and vessel-source pollution control better than the Member States individually. As a result, since the early 1990s, the legislative activity of the Community in this area has been notable.

16.3. Institutional Framework of Decision Making in the EU

There are three main institutions involved in the EU law-making process: the European Commission, European Parliament and the European Council. Each has a different role and objective. The process can be described as a rather general scheme with the European Commission serving as the executive body and "watchdog" of the EU. It has responsibility for bringing action for infringements against the Member States. The Commission also has an exclusive right of initiating legislation (the "proposal"). The European Parliament consists of directly elected Members. The European Council is comprised of representatives from each Member State. They consider, according to a certain legislative path within the so-called co-decision procedure (in relation to maritime transport issues), the proposal and propose their amendments.[2]

Under the co-decision procedure,[3] a new legislative proposal is drafted by the European Commission. The proposal then comes before the European Parliament and the Council of Ministers. The two institutions discuss the proposal independently, and each may amend it freely. In Council, a new proposal is first considered by a working group for that policy area.

[2] See H. Ringbom, *The EU Maritime Safety Policy and International Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2008), p. 11 et seq.; K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union* (London: Thomson Sweet & Maxwell, 2006), p. 592 et seq.

[3] *Treaty establishing the European Community*, Rome, 25 March 1957 [hereinafter Treaty of Rome], Article 251.

The conclusion of the working group's discussions is known as the *orientation generale*, and usually forms the basis of Council's position at the end of the first reading, which is known as the common position. Meanwhile, Parliament appoints one of its members as *Rapporteur* to steer the proposal through its committee stage. The Rapporteur is responsible for incorporating the committee's amendments into the draft proposal, as well as the recommendations of the Committee of the Regions and the Economic and Social Committee. The finished report is then voted on in full plenary, where further amendments may be introduced.

In order for the proposal to become law, Council and Parliament must approve each other's amendments and agree upon a final text in identical terms. If the two institutions have agreed on identical amendments after the first reading, the proposal becomes law; this happens from time to time, either where there is a general consensus or where there is great time pressure to adopt the legislation. Otherwise, there is a second reading in each institution, where each considers the other's amendments. Parliament must conduct its second reading within three months of Council delivering its common position, or else Council's amendments are deemed to have been accepted, though this time period can be extended by Parliament if it chooses to do so. If the institutions are unable to reach agreement after the second reading, a conciliation committee is set up with an equal number of members from Parliament and Council. The committee attempts to negotiate a compromise text which must then be approved by both institutions. Both Parliament and Council have the power to reject a proposal either at second reading or following conciliation, causing the proposal to fall. The Commission may also withdraw its proposal at any time.

16.4. Development of EU Maritime Policy

The European rules on transport are provided for in Articles 70–80 (previously 74–84) of the Treaty of Rome of 1957. However, they only apply to transport by rail, road and inland waterway.[4] According to Article 80.2, the European Council was supposed to lay down appropriate provisions for sea and air transport.[5] Nevertheless, the first legislative measures regarding sea transport

[4] L. O. Blanco and B. Van Houtte, *Las Normas de Competencia Comunitarias en el Transporte*, (Madrid: Civitas, 1996), p. 27 et seq.

[5] R. Confavreux, "Les transports maritimes dans le droit de la concurrence communautaire," *Revue de Marché commun et de l'Union européenne* 398 (May 1996): 369–379, p. 370.

were not taken until the 1970s and they mostly concerned issues of external relations of the Community.[6] The Council delayed the creation of the Common Transport Policy as the EU Member States were unwilling to hand over to the Community the competences usually identified with the sovereignty and political and commercial power of the states. In 1983, the European Parliament brought to the European Court of Justice (ECJ) a case against the Council of the European Communities for failure to act and the ECJ confirmed that the Council failed to create common maritime transport policy.[7]

Following this, on 22 December 1986, Council adopted four regulations that created the basis of such policy:[8]

- Regulation 4055/86 on the principle of freedom to provide services between Member States and between Member States and third countries[9]
- Regulation 4056/86 concerning detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport[10]
- Regulation 4057/86 on unfair pricing practices in maritime transport[11]
- Regulation 4058/86 on co-ordination action to safeguard free access to cargoes in ocean trades[12]

As Regulation 4055/86 did not deal with maritime cabotage, a separate legal act was adopted in 1992:

- Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (cabotage)[13]

The EU started to take interest in maritime safety policy only in the 1990s. Until then it seemed sufficient that EU Member States were parties to

[6] F. Santoro, *La Politica dei transporti della Comunita' Economica Europea* (Torino: UTET, 1974), p. 383 et seq.; R. Greaves, "EC Maritime Transport Policy: a Retrospective View," in H. J. Bull and H. Stemshaug, eds, *EC Shipping Policy* (Oslo: Juridisk Forlag, 1997), p. 26 et seq.
[7] Case 13/83, *European Parliament v. Council of the European Communities*, 1985 *E.C.R.* 1513.
[8] See M. A. Nesterowicz, "Freedom of services of the EC in maritime transport," *Journal of Maritime Law and Commerce* 34/4 (October 2003): 629–645.
[9] 22 December 1986, *Official Journal* 1986 L 378/1.
[10] 22 December 1986, *Official Journal* 1986 L 378/4.
[11] 22 December 1986, *Official Journal* 1986 L 378/14.
[12] 22 December 1986, *Official Journal* 1986 L 378/21.
[13] 7 December 1992, *Official Journal* 1992 L 364/7.

the International Maritime Organization (IMO) and were implementing international conventions. However, between 1986 and 1991 the worldwide rate of total losses of ships averaged 230 vessels per year, of which losses of oil tankers constituted a considerable part.[14] Some of these vessels seriously damaged EU marine ecosystems.[15] As a result, still maintaining its commitment to the implementation of international rules, the Council of the EU passed a resolution calling upon the European Commission to start promoting and improving EU action in the area of maritime safety.[16] The Commission drafted its White[17] and Green[18] Papers on Common Maritime Transport Policy, analysing, among other matters, the impact of shipping on the environment. A more substantive document called Common Policy on Safe Seas was presented in 1993[19] as a direct consequence of other oil tanker accidents.[20] In the latter document, the Commission prioritised common initiatives to implement the existing international rules and insisted on a stricter enforcement of those rules, especially through more effective control of ships visiting EU ports. The Commission also urged the development of maritime infrastructure, modernisation of traffic control navigation systems, installation of reception facilities in ports, and training and education of crews. In the same document, it emphasised that its role was not to replace IMO in its rule making but to assist it.[21]

During the next several years, the EU Council adopted several directives and regulations on safety that mostly implemented IMO rules:

[14] A. A. Pallis, *The Common EU Maritime Transport Policy* (Aldershot: Ashgate, 2002), p. 103 et seq.; C. de la Rue and Ch. B. Anderson, *Shipping and the Environment: Law and Practice* (London: LLP 1998), p. 825 et seq.

[15] E.g., the *Aragon* and *Khark-V* tankers in 1989.

[16] Council Resolution on the prevention of accidents causing marine pollution, 19 June 1990, *Official Journal* 1990 C 206/1.

[17] Commission of the European Communities, *The Future Development of the Common Transport Policy*, Communication from the Commission, COM(92)494 final (Brussels, 2 December 1992).

[18] Commission of the European Communities, *Green Paper on the Impact of Transport on the Environment*, Communication from the Commission, COM(92)46 final (Brussels, 20 February 1992).

[19] Commission of the European Communities, *A Common Policy on Safe Seas*, Communication from the Commission, COM(93)66 final (24 February 1993).

[20] These include the *Aegean Sea* in 1992 and *Braer* in 1993.

[21] See also a new Communication: Commission of the European Communities, *Strategic Goals and Recommendations for the EU's Maritime Transport Policy until 2018*, Communication from the Commission, COM(2009)8 final (Brussels, 21 January 2009).

- Council Directive 93/75/EEC Concerning Minimum Requirements for Vessels Bound for or Leaving Community Ports and Carrying Dangerous or Polluting Goods[22]
- Council Directive 94/57/EC on Common Rules and Standards for Ship Inspection and Survey Organizations and for the Relevant Activities of Maritime Administrations[23]
- Council Directive 94/58/EC on the Minimum Level of Training of Seafarers[24]
- Council Regulation No. 2978/94 on the Implementation of IMO Resolution A.747(18) on the Application of Tonnage Measurement of Ballast Spaces in Segregated Ballast Oil Tankers[25]
- Council Regulation No. 3051/95 on the Safety Management of Roll-on/Roll-off Passenger Ferries[26]
- Council Directive 95/21/EC Concerning the Enforcement, in Respect of Shipping Using Community Ports and Sailing in the Waters Under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution Prevention and Shipboard Living and Working Conditions (Port State Control)[27] by which the voluntary rules on port state control included in the Paris Memorandum were made binding in the EU
- Council Directive 98/18/EC on Safety Rules and Standards for Passenger Ships[28]
- Council Directive 1999/35/EC on a System of Mandatory Surveys for the Safe Operation of Regular Ro-Ro Ferry and High-speed Passenger Craft Services[29]
- Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on Port Reception Facilities for Ship-generated Waste and Cargo Residues[30]

On 12 December 1999, a Maltese tanker, *Erika*, carrying approximately 30,000 tons of heavy fuel oil, broke in two off the coast of Brittany, France. Age, corrosion, insufficient maintenance, and inadequate surveys were all

[22] 13 September 1993, *Official Journal* 1993 L 247/19.
[23] 22 November 1994, *Official Journal* 1994 L/20.
[24] 22 November 1994, *Official Journal* 1994 L 319/28.
[25] 21 November 1994, *Official Journal* 1994 L 319/1.
[26] 8 December 1995, *Official Journal* 1995 L 320/14.
[27] 19 June 1995, *Official Journal* 1995 L 157/1.
[28] 17 March 1998, *Official Journal* 1998 L 144/1.
[29] 29 April 1999, *Official Journal* 1999 L 138/1.
[30] *Official Journal* 2000 L 332/81.

contributing factors to the structural failure of the ship. In response to the accident, the European Community decided to undertake measures that would help to avoid similar incidents in the future and that would assure adequate compensation to the victims of oil pollution disasters.[31]

A package of legal measures, called the "Erika I package," was issued by the Commission in March 2000. It consisted of proposals for a directive strengthening port state inspections in the EU, a directive strengthening the monitoring of the activities of classification societies, and a regulation introducing an accelerated timetable for the withdrawal of single-hulled tankers. In consequence, three measures were adopted:

- Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001 Amending Council Directive 95/21/EC Concerning the Enforcement, in Respect of Shipping Using Community Ports and Sailing in the Waters Under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution Prevention and Shipboard Living and Working Conditions (Port State Control)[32]
- Directive 2001/105/EC of the European Parliament and of the Council of 19 December 2001 Amending Council Directive 94/57/EC on Common Rules and Standards for Ship Inspection and Survey Organizations and for the Relevant Activities of Maritime Administrations[33]
- Regulation (EC) No. 417/2002 of the European Parliament and of the Council of 18 February 2002 on the Accelerated Phasing-in of Double Hull or Equivalent Design Requirements for Single Hull Oil Tankers and Repealing Council Regulation (EC) No. 2798/94[34]

In December 2000, the Commission issued a second package of proposals, the "Erika II package."[35] These proposals included a regulation creating the

[31] Commission of the European Communities, *Safety of the Seaborne Oil Trade*, Communication from the Commission, COM(2000)142 final (Brussels, 21 March 2000).
[32] *Official Journal* 2002 L 19/17.
[33] *Official Journal* 2002 L 19/9.
[34] *Official Journal* 2002 L 64/1.
[35] Commission of the European Communities, *Second Set of Community Measures on Maritime Safety Following the Sinking of the Oil Tanker Erika*, Communication from the Commission, COM(2000)802 final (Brussels, 6 December 2000). See also, H. Ringbom, "The Erika Accident and Its Effects on EU Maritime Regulation," in M. H. Nordquist and J. Norton Moore, eds, *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (Leiden: Kluwer, 2001), p. 265 et seq.; M. A. Nesterowicz, "European Union Legal Measures in Response to the Oil Pollution of the Sea," *Tulane Maritime Law Journal* 29, no. 1 (2004): 29–44.

European Maritime Safety Agency (EMSA), a directive concerning the establishing of a monitoring and information system for improving the surveillance of traffic in European waters, and a regulation aimed at establishing a complementary European fund (amounting to one billion euro) for the indemnity of victims of oil spills. Two measures were adopted:

- Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 Establishing a Community Vessel Traffic Monitoring and Information System and Repealing Council Directive 93/75/EEC[36]
- Regulation (EC) No. 1406/2002 of the European Parliament and of the Council of 27 June 2002 Establishing a European Maritime Safety Agency[37]

The proposal for the establishment of the EU compensation fund was not adopted[38] because a supplementary fund of a similar scope, but at the international level, was created at the forum of the IOPC Funds in response to the EU proposal.[39]

On 13 November 2002, a Bahamas-registered tanker, *Prestige*, broke in two off the coast of Galicia, Spain, spilling an unknown, but substantial, quantity of its cargo of heavy fuel oil.[40] In response, in March 2003, the Commission drafted another proposal for a directive on ship-source pollution and on the introduction of penalties for infringements, which was adopted in September 2005 as Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements. [41]

In November 2005, the Commission presented a third package of legislative measures dealing with maritime safety[42] The package consisted of the following seven proposals:

1. Proposal for a Directive of the European Parliament and of the Council on compliance with flag State requirements[43]

---

[36] *Official Journal* 2002 L 208/10.
[37] *Official Journal* 2002 L 208/1.
[38] *Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a Fund for the Compensation of Oil Pollution Damage in European Waters and Related Measures*, COM(2000)802 final, *Official Journal* C120E, 24 April 2001.
[39] International Oil Pollution Compensation Funds website at <www.iopcfund.org> (retrieved 1 December 2008).
[40] A. Goodman, "Crippled Fuel Oil Tanker Sinks," *CNN* (20 November 2002), available: <http://archives.cnn.com/2002/WORLD/europe/11/19/spain.oil/index.html> (retrieved 12 November 2008).
[41] 7 September 2005, *Official Journal* 2005 L 255/11.
[42] M. A. Nesterowicz, "European Union Legal Measures in Response to the Oil Pollution of the Sea," *Greek Maritime Law Journal* (October 2006): 241–252.

2. Proposal for a Directive on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations[44]
3. Proposal for a Directive of the European Parliament and of the Council on port State control[45]
4. Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system[46]
5. Proposal for a Directive of the European Parliament and of the Council establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Directives 1999/35/EC and 2002/59/EC[47]
6. Proposal for a Regulation of the European Parliament and of the Council on the liability of carriers of passengers by sea and inland waterways in the event of accidents[48]
7. Proposal for a Directive of the European Parliament and the Council on the civil liability and financial guarantees of shipowners[49]

The European Parliament held its first votes on the proposals on 29 March and 25 April 2007, and was generally supportive of the Commission's proposals. The Council adopted its common positions for the six files on 6 June 2008. After long and difficult discussions, it adopted political agreements for flag state requirements and civil liability proposals on 9 October 2008. In the meantime, unsure of the outcome of the Transport, Telecommunications and Energy Council of 9 October, the European Parliament held its second reading vote on 24 September 2008 on the other six proposals. Since it became clear that the Council would not be able to accept the Parliament's position, the preparations for conciliation started.

A series of informal trilogues on the six proposals were held during August, November and December 2008. On 8 December, the Conciliation Committee was convened to formalise the remaining differences between the Council and European Parliament. It included eight proposals (as the European Parliament agreed to approve the two Council common positions of 9 October without further amendments). Most of the proposals actually had already

[43] COM/2005/0586 final (Brussels, 23 November 2005).
[44] COM/2005/0587 final (Brussels, 23 November 2005).
[45] COM/2005/0588 final (Brussels, 23 November 2005).
[46] COM/2005/0589 final (Brussels, 23 November 2005).
[47] COM/2005/0590 final (Brussels, 23 November 2005).
[48] COM/2005/0592 final (Brussels, 23 November 2005).
[49] COM/2005/0593 final (Brussels, 23 November 2005).

arrived at that stage of Conciliation Committee without any controversial issues as the Parliament and Council (and the Commission) managed to come to a compromise over the two readings and the informal trilogues. One proposal, the Regulation on the liability of passenger carriers, was controversial and the Conciliation Committee had still to tackle some important issues. A common text was, however, finally agreed at the Conciliation Committee for all the proposals.

16.5. Selected Comparative Thematic Issues

16.5.1. Port State Control

In January 1982, the Paris Memorandum of Understanding on Port State Control was adopted to promote ship safety and protect the environment. Its aim was to eliminate the operation of sub-standard ships through a harmonised system of port state control. It was initially signed by fourteen European countries, and subsequently joined by others, as well as non-European countries, *inter alia*, Canada. Those voluntary rules were made binding in the EU in 1995 by Council Directive 95/21/EC Concerning the Enforcement, in Respect of Shipping Using Community Ports and Sailing in the Waters Under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution Prevention and Shipboard Living and Working Conditions (Port State Control).[50] The Directive requires state parties to inspect at least 25 percent of the ships entering their ports in relation to their compliance with binding IMO and International Labour Organization conventions.[51]

This Directive has been amended repeatedly, but a notable amendment came within the Erika I package. The amendment, Directive 2001/106,

[50] The Paris MOU continues to exist, especially because non-EU countries such as Canada are party to it.

[51] For example, the *International Convention on Load Lines*, London, 5 April 1966, in force 21 July 1968, 640 *U.N.T.S.* 133; *International Convention for the Safety of Life at Sea,* 1 November 1974, 184 *U.N.T.S.* 278; *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, 1340 *U.N.T.S.* 184; *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*, 1 July 1978, 1361 *U.N.T.S.* 190; *Convention on the International Regulations for Preventing Collisions at Sea*, London, 20 October 1972, 1143 *U.N.T.S.* 347; *International Convention on Tonnage Measurement of Ships,* London, 23 June 1969, 1110 *U.N.T.S.* 318; and *Convention Concerning Minimum Standards in Merchant Shipping*, 29 October 1976, 1259 *U.N.T.S.* 335 (ILO Convention No. 147).

consisted of banning ships older than fifteen years that have been detained more than twice in the course of the preceding two years from EU ports. A "blacklist" of detained and banned ships is now published every six months.[52] In addition, inspections of older ships were made more detailed, for example tankers must now have one ballast tank inspected regularly. Ships are obliged to communicate certain information before entering ports to facilitate the preparation of inspections.

In 2002, EMSA was entrusted the task of visiting Member States on a regular basis and assessing whether their port state control systems and related procedures fully comply with the EU legislation. EMSA also publishes and updates a list of banned ships. In the near future, EMSA will develop a project for a new information system which will support the considerable renewed new inspection regime for port state control.

In 2005 the Commission proposed, within the third safety package, to recast the Directive and to simplify and amend certain provisions in order to reinforce effectiveness and quality of inspections on ships. The new Port State Control Directive will establish a new inspection system, both in relation to ships in ports and at anchorage, focused on "substandard vessels," while the burden will be alleviated with regard to quality vessels. The new system will not be based on a 25 percent inspection requirement but in fact 100 percent in relation to some vessels. In particular it will take into account ships' "risk profiles," subjecting higher-risk vessels, including all passenger ships and oil and chemical tankers of more than 12 years of age, to more frequent checks. Special attention will be given to vessels that do not call often at Community ports. Ships not in conformity with the required standards can receive a three-month ban on entering EU ports for the first time, a 12-month ban the second time, and a 24-month ban for the third time. Any further detention will result in a permanent ban from EU ports. This last point was a subject for the Conciliation Committee to consider as the European Parliament insisted on its inclusion.

[52] The first such list was published on 13 November 2003, see 2003 *Official Journal* C 272/16. See also, Commission of the European Communities, "One year after the Prestige disaster, the Commission publishes the first list of ships definitively banned from EU ports," *Press Release RAPID*, IP/03/1547 (Brussels, 14 November 2003). It is currently maintained by EMSA and accessible through its webpage.

16.5.2. Delegation of Functions to Classification Societies and Their Supervision

To a large extent, EU Member States delegate the statutory tasks of certification (in order to verify compliance of ships with international safety requirements) to classification societies. However, this can only be done in relation to the societies recognised by the EU. To date there are 13 such societies.[53]

The rules on recognition were adopted in 1995 by the Directive 94/57/EC on Common Rules and Standards for Ship Inspection and Survey Organizations and for the Relevant Activities of Maritime Administrations. Only Member States can request EU recognition of a classification society. The Commission grants recognition on the basis of an assessment. The recognition is valid either for the whole EU or for certain countries. Thereafter, each recognised society is to be reassessed every two years.

The amendment of the rules in the Erika I package, Directive 2001/105, simplified the procedure according to which the Commission can suspend or withdraw recognition from the societies that failed to comply with the criteria laid down in the Directive. Moreover, more stringent criteria were set for the societies (e.g., certain procedures when a ship changes class).

EMSA has been entrusted with carrying out the inspections of classification societies on behalf of the European Commission, which in turn replaced the individual recognition procedures of the Member States. The inspections cover both head offices and selected regional offices, and also include visits to ships for the purpose of checking the performance of the classification society in question. EMSA also carries out special assessments of classification societies for which EU recognition is being requested by one or more (new) Member States.

In 2005, the Commission proposed, within the third safety package, to recast the Directive. The aim of the new legislation is to strengthen the control over recognised organizations and to reform the system of penalties against those which infringe the minimum criteria. The Council proposed to split the Commission's proposal into two acts: a directive and a regulation. The directive will include provisions addressed to Member States concerning their relationship with ship inspections and survey organisations. The regulation will contain all provisions related to recognition at the Community level, i.e., granting and withdrawal of the recognition by the Commission, the obligations and criteria to be fulfilled by the

[53] List of organisations recognised on the basis of Council Directive 94/57/EC on common rules and standards for ship inspection and survey organisations and for relevant activities of maritime administrations (Notices from Member States), *Official Journal* 2007 C 135/4. See also: European Maritime Safety Agency website at <http://www.emsa.europa.eu/end185d007d001d001.html> (retrieved 15 November 2008).

organisations to be eligible for Community recognition, and sanctions on organisations for failing to fulfil those obligations.

The Conciliation Committee discussed in particular, in relation to the proposed regulation, the issues of quality standards of the recognised organisations. It was agreed that the recognised organisation must develop, implement and maintain an effective internal quality system based on appropriate parts of internationally recognised quality standards and in compliance with EN ISO/IEC 17020:2004 (inspection bodies) and with EN ISO 9001:2000 (quality management systems, requirements), as interpreted and certified by the Quality Assessment and Certification Entity. The Quality Assessment and Certification Entity shall have the necessary governance and competences to act independently of the recognised organisations and shall have the necessary means to carry out its duties effectively and to the highest professional standards.

16.5.3. Phasing-Out of Single-Hull Tankers

A revised Regulation 13G, Annex I of the International Convention for the Prevention of Pollution from Ships (MARPOL), contains provisions relating to the gradual phasing-out of single-hull oil tankers and their replacement by double-hull tankers or tankers of equivalent design.[54] Oil tankers built since 1996 must have a double hull or be of equivalent design, while all existing single-hull oil tankers are to be phased out by 2026. This timetable was, however, considered too slow by the EU. Regulation (EC) No. 417/2002 of the European Parliament and of the Council of 18 February 2002 on the Accelerated Phasing-in of Double Hull or Equivalent Design Requirements for Single Hull Oil Tankers (…) was adopted within the Erika I package. It introduced an accelerated timetable (compared to that of the IMO) for replacement in EU waters of single-hull tankers by double-hull tankers. Depending on their age and tonnage, the single-hull tankers are divided into three groups. They should be withdrawn by 2005, 2010, and 2015. The Regulation entered into force on 27 March 2002. The international community followed the EU approach, and the same timetable was introduced under MARPOL.

[54] Those rules were added to MARPOL in 1991 following *Exxon Valdez* accident (but the United States never adhered to them).

After the sinking of the *Prestige*, the Commission decided to propose additional amendments to the regulation on phasing-out of single-hull tankers.[55] According to those amendments, carriage of heavy fuel oil in single-hull tankers was banned, and the phasing-out timetable was accelerated, depending on tonnage and age, and for single-hull tankers older than 15 years an additional inspection, a condition assessment survey (CAS), was introduced in order to continue serving until the age of 25.[56] This also was followed by a parallel amendment to MARPOL.[57]

16.5.4. Use of Regulatory Tools to Monitor Vessel Traffic for the Purpose of Marine Safety and Environmental Protection

16.5.4.1. Navigational Measures

The Directive on Community Vessel Traffic Monitoring and Information System, adopted by the Council and European Parliament within the Erika II package, established an information system for all ships in EU waters, even if they do not enter any EU ports (however, enforcement is port based). Reporting requirements imposed on the shipowners (or ship operators or agents) were already provided for in Directive 93/75.[58] The reporting requirements for vessels carry dangerous or polluting goods have been extended to new cargos and simplified. Notification can now be done through the electronic data exchange system. The Directive also improves the procedure for the transmission and use of data relating to dangerous cargo and creation of various common databases. It introduced an obligation for

[55] Regulation (EC) No. 1726/2003 of the European Parliament and of the Council of 22 July 2003 Amending Regulation (EC) No. 417/2002 on the Accelerated Phasing-in of Double-Hull or Equivalent Design Requirements for Single-Hull Oil Tankers, *Official Journal* 2003 L 249/1.

[56] Eventually, IMO also agreed to introduce new double-hull requirements at the worldwide level to close the gap with new EU safety rules (e.g., prohibition of carriage of heavy oil in single-hull tankers, a speeded up programme for the gradual phasing-out of single-hull tankers, and special inspection arrangements for single-hull tankers older than fifteen years to assess their structural state). The final decision was made on 4 December 2003, and the new standards came into force 5 April 2005. See Commission of the European Communities, "Maritime safety: IMO introduces new double-hull requirements at world-wide level to close the gap with new EU safety rules," *Press Release RAPID*, IP/03/1667 (Brussels, 5 December 2003).

[57] See J. Angelo, "Erika Aftermath: Developments at IMO on Double Hulls," in Nordquist and Norton Moore, n. 37 above, p. 309–318.

[58] Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods, *Official Journal* 1993 L 247/19.

ships to carry automatic identification systems (AIS). EMSA was tasked with the creation and management of SafeSeaNet, an EU information system that receives and stores the notifications sent by ships carrying hazardous cargos. The system is shared by all EU Member States.

In 2005, the Commission proposed, within the Erika III package, to recast the Directive. The aim of the new Directive on Community Vessel Traffic Monitoring and Information System is to enhance ship safety and environmental protection. It contains provisions for the enhancement of the SafeSeaNet system (e.g., ensuring that the system is operational on a 24-hour-a-day basis). It also proposes that the AIS should be made mandatory for fishing vessels longer than 15 metres.

16.5.4.2. Particularly Sensitive Sea Areas

Particularly sensitive sea areas (PSSAs) are created by the IMO on the initiative of one or more states for the purpose of protecting the coastal zone. The modalities of such zones are based on a series of IMO Guidelines.[59] There are four PSSAs in the EU: Wadden Sea, Canary Islands, Western European Waters,[60] and the Baltic Sea.[61] However, there is no special EU policy on PSSAs; these PSSAs were created on the initiative of one or more Member States. The Baltic Sea PSSA includes ship routing measures based on other conventions, and the Western European Waters PSSA introduced a tanker reporting system, WETREP.[62]

The EU has been trying to create a coherent network of protected areas within its environmental policy on the basis of Birds' Directive[63] and the Habitats Directive.[64] In particular, the Habitats Directive establishes a network

[59] Res. A.720(17) of 1991, A.885(21) of 1999 and A.927(22) of 2001. The most recent are Res. A982(24), "Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas" of 2005. See: H. Lefebvre-Chalain, "Les 15 ans de Zones Marines Particulièrement Sensibles (PSSA) : un concept en dévelopment," *Annuaire de Droit Maritime et Océanique* (2007): 351–369.

[60] The Western European Waters PSSA includes the territorial seas and parts of the EEZs or pollution control zones of Belgium, France, Ireland, Portugal, Spain and the United Kingdom.

[61] The Baltic Sea PSSA includes the entire Baltic Sea except "Russian waters."

[62] There was a suggestion to prohibit a certain class of ships from entering these waters but it was abandoned.

[63] Council Directive 79/409/EEC on the conservation of wild birds, 2 April 1979, *Official Journal* 1979 L 221/10.

[64] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, 21 May 1992, *Official Journal* 1992 L 206/7.

of protected areas called Natura 2000.[65] These have been mainly land areas, although the Sixth Environmental Action Programme of 2001 and the Commission Communication of 2003[66] both recommend the extension of Natura 2000 to the marine environment.[67]

16.5.5. Vessel-Source Pollution: The Regime for Pollution Offences

In 2005, the European Parliament and the Council adopted Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.[68] The purpose of this Directive is to incorporate international standards for ship-source pollution (especially MARPOL[69]) into Community law and to ensure that persons responsible for discharges are subject to adequate penalties in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships. In particular, Member States are to ensure that ship-source discharges of polluting substances into internal waters, including ports, the territorial sea, straits used for international navigation subject to the regime of transit passage, the EEZ or equivalent zones, and the high seas, are regarded as infringements if committed with "intent, recklessly or by serious negligence." Such infringements should be subject to effective, proportionate and dissuasive penalties (criminal or administrative).[70]

---

[65] See V. Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea* (Leiden, Boston: Martinus Nijhoff Publishers, 2007), p. 380 et seq.

[66] Commission of the European Communities, *Towards a strategy to protect and conserve the marine environment*, Communication from the Commission, COM(2002)539 (Brussels, 20 October 2002).

[67] It is, however, not excluded even now that Natura 2000 sites can be designated in maritime areas. The Directive limits its scope to the territory of the Member State. Therefore such areas could be created within the territorial sea or possibly even the EEZ if such an area is established. In case C-6/04, *Commission v. United Kingdom* (E.C.R. 2005, p. I-9017 of 20 October 2005), the ECJ confirmed that the Habitat Directive may be implemented in the EEZ. However, the effective management of such sites would require an amendment of the Directive (i.e., to include marine species in the annexes). The Commission is preparing such an amendment.

[68] 7 September 2005, *Official Journal* 2005 L 255/11.

[69] For more about the international rules concerning ship-source pollution, see E. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Utrecht: University of Utrecht Publisher, 1998), p. 41 et seq.

[70] The validity of the Directive has been questioned in Case C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport*. The prejudicial questions were asked to the ECJ in relation to the compatibility of

The Directive was complemented by Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution.[71] However, this Directive was later made invalid by the judgment of the European Court of Justice in the case C-440/05, *Commission of the European Communities v. Council of the European Union*.[72] As a result, a new Proposal has been presented by the Commission,[73] which includes in the new directive certain elements that were previously in the Framework Decision regarding criminal offences.

According to the Proposal, Member States are to ensure that ship-source discharges of polluting substances into the areas listed above are regarded as criminal offences if committed with intent, recklessly or with serious negligence. They should be punished by effective, proportionate, and dissuasive criminal penalties (imposed on both physical and legal persons).

The enforcement of the Directive is mostly in ports (in reference to Article 218 of the United Nations Convention on the Law of the Sea – LOS Convention[74]) either within the port of the Member State concerned, if the ship enters such a port, or within the next port of call (in the EU) if the discharge was done by the ship in transit. However, the Directive also provides for the possibility of at-sea enforcement. Article 7.2 states:

> Where there is clear, objective evidence that a ship navigating in the [territorial sea or EEZ] committed … an infringement resulting in a discharge causing major damage or a threat of major damage to the coastline or related interests of the Member State concerned …, that State shall, subject [Article 220(6) of the LOS Convention[75]] and

---

the Directive with the LOS Convention and MARPOL and definition of "serious negligence." The judgment of the Court of 3 June 2008 did not invalidate the Directive.

[71] *Official Journal* 2005 L 255/164

[72] *Commission of the European Communities v. Council of the European Union,* C-440/05, 23 October 2007.

[73] *Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements*, COM(2008)0134 final - COD 2008/0055 (Brussels, 11 March 2008).

[74] Article 218 provides for investigation in the port for the discharges from that vessel which occurred outside the internal waters, the territorial sea, or the EEZ.

[75] Article 220(6) provides:

> Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in para. 3 [a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State] resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may …

> provided that the evidence so warrants, submit the matter to its competent authorities with a view to instituting proceedings, including detention of the ship, in accordance with its national law.[76]

16.5.6. Places of Refuge for Ships in Need of Assistance

A Directive on Community Vessel Traffic Monitoring and Information System from the Erika II package also introduced an obligation for EU Member States to draw up emergency plans for hosting ships in places of refuge in case of distress.[77] Only one article dealt with this issue. Article 20 provides:

> Member States, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority. Where the Member State considers it necessary and feasible, the plans must contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response.
>
> Plans for accommodating ships in distress shall be made available upon demand. Member States shall inform the Commission by 5 February 2004 of the measures taken in application of the first paragraph.

EMSA was tasked with verifying how the Member States implemented Article 20. The evaluation followed a number of steps. First, Member States agreed to common principles in order to establish the national plans in accordance with Article 20. These principles were agreed to during an expert meeting in 2003 in Brussels. Second, Member States were required to send the national plans, including the legal transposition and the operational measures

---

> provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

[76] See Ringbom, n. 2 above, p. 401 et seq.; H. Ringbom, "The EU's Exercise of Port and Coastal State Jurisdiction," *Annuaire de Droit Maritime et Océanique* (2007): 209–224; E. Molenaar, n. 69 above, p. 104 et seq.

[77] For more on the subject of places of refuge, see A. Chircop, ed., *Places of Refuge for Ships* (Leiden, Boston: Martinus Nijhoff Publishers, 2006).

taken, to the European Commission by July 2003. The national plans had to contain certain elements:

- the identification of the authority that handles the initial response
- the identification of the authority that is responsible for directing a vessel to place of refuge
- the planning and availability of an inventory of places of refuge
- the type of cooperation that exists between neighbouring Member States
- the compensation procedures in place to deal with the resulting damage that may occur when the situation arises of vessels in distress requiring a place of refuge

A report was sent to the European Commission in September 2003 following an analysis of these plans. It was determined that additional information was required concerning the operational implementation of the national measures.

The third and final step was visits to the Member States by the Commission, supported by EMSA, in order to evaluate how each Member State applied their plan in practice and to collect any missing information. The conclusions following this step were overwhelmingly positive and indicated that the Member States have legally transposed and implemented the requirements of Article 20. However, some concerns remained:

- how the speed of decision making would be affected due to split responsibilities in certain Member States
- the absence of formalised cooperation procedures between many of the neighbouring coastal states
- gaps in the compensation system

In the third safety package, a more elaborate Article 20 of the Directive on Community Vessel Traffic Monitoring proposed in 2005 by the Commission requires Member States to appoint an independent competent authority with the responsibility for deciding, on the basis of elaborated criteria, whether or not to accept a vessel in distress into a place of refuge. A financial guarantee for eventual liability may be required from the ship, although its absence cannot be decisive in the ultimate decision of the authority.

The main discussion at the Conciliation Committee concerned the nature of the competent authority and the extent of its independence to take decisions. It was finally agreed in Article 20 that the Member States will appoint a "competent authority with powers to take independent decisions," on the basis of prior evaluation of the situation, whether or not to allow a vessel in distress into a place

of refuge. Moreover, a financial guarantee for eventual liability may be required from the ship, although its absence cannot be decisive in the ultimate decision of the authority.

16.5.7. Liability, Compensation and Response in Cases of Pollution

The majority of the EU Member States are parties to the International Convention on Civil Liability for Oil Pollution Damage (CLC Convention) and the International Oil Pollution Compensation (IOPC) Fund 1992, as well as the Supplementary Fund. A significant number of Member States are party to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention), but only a few are parties to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, and the Nairobi International Convention on the Removal of Wrecks, 2007. However, the latter two conventions are not yet in force. Nearly half of the Member States are party to the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1976) and/or LLMC 1996, with only a few having not ratified either of these conventions.

In the third safety package of November 2005, the European Commission presented two legislative projects related to the issue of civil liability: the Proposal for a regulation on liability of carriers of passengers by sea and inland waterways in the event of accidents[78] and the Proposal for a directive on civil liability and financial guarantees of shipowners.[79] Each of these Proposals is examined in turn.

Proposal for a Regulation on Liability of Carriers of Passengers by Sea and Inland Waterways in the Event of Accidents

The aim of the Regulation, as proposed in 2005, was to incorporate the provisions of the Athens Convention relating to the Carriage of Passengers and

[78] COM/2005/0592 final (Brussels, 23 November 2005).

[79] COM/2005/0593 final (Brussels, 23 November 2005). See M. A. Nesterowicz, "The third legislative package for maritime safety – the liability projects," *Annuaire de Droit Maritime et Océanique* (2007): 281–292, and by the same author, "El desarrollo de la política común de transporte marítimo de la UE al respecto de la seguridad marítima: sistemas de prevención e indemnización," *Anuario de Derecho Maritimo* 24 (2007): 219–232.

their Luggage by Sea, 2002 (which is not yet in force) regarding the liability of the carrier and a performing carrier in respect of passengers and their luggage into the European law. The Proposal actually extended the scope of application of the Athens liability rules (according to the Convention, the rules that are applicable to international maritime carriage only) to maritime cabotage and to international and domestic carriage by inland waterways. Moreover, the Regulation introduced an obligation that, in the event of the death or personal injury suffered by a passenger, the carrier is to make an advance payment sufficient to cover immediate economic needs of at least 21,000 Euro within 15 days. Finally, the carrier, the performing carrier, and/or the tour operator are to provide passengers, prior to their departure, with information regarding their rights as passengers (i.e., limits of compensation, right of direct action against the insurer or the person providing financial security, and the entitlement to advance payments). The Regulation will come into force when the Athens Convention does or on 31 December 2012, whichever comes first.

The Conciliation Committee mostly debated the scope of the Regulation. It was agreed—and such is a final version of the Regulation—that it is not going to include inland waterways transport, but the Commission is to study the characteristics of this sector and propose separate rules in the future. Second, in relation to the application of the rules to cabotage, different transition periods were agreed upon depending on the class of the concerned ships (as in Directive 98/18). Class A ships will enjoy a transition period until 31 December 2016 and class B ships until 31 December 2018. In respect of the class C and D ships, the Commission will present a new proposal by 30 June 2013.

Proposal for a Directive on Civil Liability and Financial Guarantees of Shipowners

The Proposal of the Commission provided that the EU Member States should all become contracting parties to the International Convention on Limitation of Liability for Maritime Claims, as amended in 1996. It also proposed to limit the application of the rules on limitation of liability in relation to vessels flying a flag of a State not party to the LLMC 1996. That means that an owner of a ship flying the flag of a State not party to the LLMC 1996 would lose the right to limit his liability if it could be proven that "the damage resulted from his personal act or omission, committed with the intent to cause such damage or through gross negligence."[80]

[80] In relation to LLMC 1996, the formula "recklessly and with knowledge that such loss would probably occur" was exchanged for "through gross negligence."

To ensure the effectiveness of the liability rules, the Proposal for the Directive imposed on shipowners an obligation to have insurance or other financial guarantees of civil liability and on the Member States an obligation to ensure that this in fact occurs. This obligation concerns not only every owner of a ship flying a flag of a Member State, but also every owner of a ship flying the flag of a third country "as soon as that ship enters its exclusive economic area or equivalent area." Moreover, the relevant civil liability insurance has to cover an amount at least equal to double the limits that would be calculated on the basis of the LLMC 1996 in relation to the ship in question. The existence of such financial guarantee should be verified by certificates issued or certified by a competent authority in a Member State.

In the first reading of the European Parliament (March 2007), several amendments were proposed, the most important being a proposal for the creation of the Community office for certificates of financial guarantee and a proposal for the establishment of the Solidarity Fund for compensation. Respectively, the Community office would be responsible for "keeping a full register of certificates issued, monitoring and updating their validity and checking the existence of financial guarantees registered by third countries." The Solidarity Fund would serve to compensate any damage caused by ships not having a financial guarantee. However, the Council of the European Union, in Luxembourg on 6 June 2008 decided, to suspend the Proposal due to insufficient support. In October 2008, a compromise was reached to bring the Proposal back to the legislative track. The Council common position modified the proposed text, leaving only the insurance obligation: all Member States' flagged vessels and all vessels entering EU ports will be obliged to present certificates of financial guarantee up to the LLMC 96 limits. Member States will ensure that the presence of the certificate onboard is controlled while the ship is in the port, and they will develop a system of penalties for breach of the obligation to possess a certificate. This is the final text of the Directive.

Pollution Response

The response to a pollution incident is a responsibility of each EU Member State. However, EMSA tops up their capabilities to fight oil pollution by providing special oil pollution response vessels.

In August 2003, the Commission submitted a proposal to the European Parliament and Council to amend Regulation 1406/2002 by conferring new responsibilities on EMSA in relation to maritime security, combating oil pollution, and verification of the education of seafarers in third countries.

Regulation 724/2004 was adopted.[81] In relation to combating oil pollution, EMSA was given a mandate to operate specialised pollution response ships, as well as equipment for collecting oil and other harmful substances from the sea. In order to perform this task, the Agency has signed "standby contracts" with vessels that normally do their usual work, but in an emergency will proceed to the port where they will have pollution response equipment installed and take part in the response action under the supervision of the Member State that called for such action. The vessels are stationed in a way that allows them to cover all areas identified as sensitive and with a high rate of pollution accidents in the past.

16.6. Conclusion

The European Union, within its maritime policy, has been following the international rules. The EU rules consist mostly of IMO rules made binding on the EU level. This has an added value: it allows for EU enforcement. The Commission can verify the implementation of the rules by the Member States and start an infringement procedure at the European Court of Justice if the implementation is not correct.

Sometimes, however, the EU rules may go further than the IMO rules and provide for stricter standards in EU territory. In some cases (e.g., supplementary oil pollution fund and single-hull tankers), when the EU proposed a more far-reaching solution, the international community followed.

An interesting characteristic of the EU "maritime" legislation is that the EU rules are mostly of "port state" nature. In effect, the EU acts as a port state and the rules are enforced in ports. Coastal and flag state enforcement is much less common. The legislative reviews in other chapters support these conclusions.

[81] Regulation (EC) No. 724/2004 of the European Parliament and of the Council of 31 March 2004 Amending Regulation (EC) No. 1406/2002 Establishing a European Maritime Safety Agency, *Official Journal* 2004 L 129/1.